

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRIAN BERRY

Claimant

VS.

**CARY W. ELDRIDGE d/b/a ELDRIDGE
CUSTOM HOMES**

Respondent

AND

**KANSAS WORKERS COMPENSATION
FUND**

Docket No. 1,057,900

ORDER

STATEMENT OF THE CASE

Respondent appealed the November 21, 2011, Preliminary Decision entered by Administrative Law Judge (ALJ) Marcia L. Yates. Jan L. Fisher, of Topeka, Kansas, appeared for claimant. Denise E. Tomasic, of Kansas City, Kansas, appeared for respondent. Timothy G. Elliott, of Shawnee Mission, Kansas, appeared for the Kansas Workers Compensation Fund (Fund).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 10, 2011, preliminary hearing and exhibits thereto; the transcript of the November 16, 2011, deposition of Robert B. Owens and exhibit thereto; the transcript of the November 16, 2011, deposition of Cary W. Eldridge and exhibits thereto; the transcript of the November 8, 2011, deposition of Cary Eldridge; and all pleadings contained in the administrative file.

ISSUES

1. Was claimant an employee of respondent on the date of accident or an independent contractor? Claimant alleges he was an hourly employee of respondent. Respondent, Cary W. Eldridge, does business as Eldridge Custom Homes and builds and

remodels homes. Respondent alleges he uses independent contractors to perform most physical labor jobs. In 2010 and 2011, respondent hired Jose Martinez to mow and do cleanup, and there was a question as to whether Mr. Martinez was respondent's employee or an independent contractor. In 2011, respondent employed his daughter to perform office work. Respondent performs no physical labor. Respondent asserted he hired claimant as an independent contractor to perform trim carpentry work.

2. Does respondent have a sufficient payroll to subject him to the provisions of the Kansas Workers Compensation Act (Act)? K.S.A. 44-505(a)(2) exempts an employer from the Act where the employer had a gross payroll of not more than \$20,000 the previous calendar year and does not reasonably estimate having a gross payroll of more than \$20,000 in the current calendar year. Wages paid to the employer's family by marriage or consanguinity are not included in the \$20,000. Respondent asserts his payroll did not meet the \$20,000 threshold in the previous or current calendar years as, at most, he had only one non-family employee. Claimant alleges that in 2010, respondent's 2010 tax return lists "cost of labor" as \$26,714 and, in 2011, respondent could reasonably be expected to pay more than \$20,000 in wages to non-family employees.

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant has been a carpenter in the Lehigh, Kansas, area for 20 years. Claimant testified that prior to working for respondent, he worked for Jantz Construction as an hourly employee for one and one-half years. He was terminated for measuring a job wrong and began receiving unemployment benefits. He started looking for employment in the Newton and Wichita, Kansas, areas and on the internet. He did not advertise for work as a self-employed carpenter, nor did he have a company name. In August 2011, claimant saw an advertisement placed by respondent on Craigslist. He said the advertisement stated: "Looking for trim carpenters in Basehor, western Leavenworth County, and Wyandotte."¹ Claimant testified the advertisement went on to say that the rate of pay was \$16 to \$18 per hour and the name of the employer was Eldridge Construction or Eldridge Custom Homes.

Claimant called the telephone number in the advertisement and spoke to respondent. Claimant told respondent he was seeking employment and listed his abilities as a trim carpenter. He sought \$22 per hour in wages and indicated a willingness to move to the Kansas City area. According to claimant, respondent said, "he'd see what he could do once I had an interview and whatnot."²

¹ P.H. Trans. at 10.

² P.H. Trans. at 11.

During the first week of September 2011, claimant met with respondent at a sports bar in Basehor, Kansas. Claimant testified that Robert B. "Brad" Owens, respondent's foreman, was also present at the interview. Mr. Owens wore a T-shirt with respondent's logo. Respondent and claimant again discussed claimant's carpentry abilities and compensation. Respondent agreed to start claimant at \$16 per hour and said if things worked out claimant's wages would be increased. Claimant acknowledged that when he met with respondent, there was no discussion about health insurance, vacation leave or other benefits. There was no agreement that claimant would work exclusively for respondent, nor was claimant asked for his social security number. Based on this conversation, claimant and his wife moved to Eudora, Kansas, to be closer to work. Claimant testified that Lehigh is approximately 160 miles from the Kansas City area.

Claimant again met with respondent on Monday, September 12, 2011, which was claimant's first day of work for respondent. Respondent showed claimant several homes that respondent was building. They eventually met at a house located at 158th and Leavenworth Road, where respondent showed claimant work that claimant was to perform. Claimant testified his work hours were set by respondent from 7 a.m. to 3:30 p.m. with a lunch break and two other breaks. They did not discuss whether claimant could employ other workers to assist him. Claimant believed he was to work alone. Claimant did not submit a bid to respondent to work on the houses. Respondent and claimant did not discuss the length of claimant's employment or a termination date.

Claimant testified he used respondent's tools at the job site, including table saws, chop saws, air nailers and other tools necessary to do finish/trim work. However, claimant did provide his own tool belt and used hand tools that were on the belt. Respondent provided all building materials for the job. At the end of claimant's first day on the job, respondent came back to review the work claimant had completed. The next two days, Tuesday and Wednesday, respondent stopped at the job site once a day to review claimant's work and let claimant know if there were any additions or changes. Claimant worked eight hours on Tuesday and Wednesday. Claimant worked alone at the job site.

On Thursday, September 15, 2011, claimant was cutting coarse shelf board on a table saw. The table saw was on a bench supported by aluminum sawhorses. As claimant was cutting the board, the aluminum sawhorses gave away. The table saw fell and the table saw blade cut claimant's thigh from above the knee, down through the knee and into the lower leg.

Claimant immediately called 911. The sheriff arrived first and then respondent. Respondent put a shirt around the wound to stop the bleeding. An ambulance arrived and transported claimant to the University of Kansas Medical Center, where he underwent surgery. Claimant cut all the band muscles, tendons and all the nerves from the knee down. No damage was done to the bone. Respondent acknowledges claimant suffered a work related injury. The saw used by claimant when he was injured belonged to Mr. Owens, not respondent.

Claimant conceded that he was not provided training by respondent, drove his own truck to the job site and did not punch a time clock or complete a time card. Claimant testified that after the accident, he received \$416 for his work, and no taxes or insurance were deducted.

Claimant's wife, Judy Berry, testified that after claimant's accident, she went to respondent's place of business to pick up claimant's paycheck. Mrs. Berry was asked by respondent for claimant's social security number and his driver's license. She asked respondent how many hours the check represented and he told her "[t]hree of eight and one of two."³ Mrs. Berry determined that the amount of the check, \$416, was correct by multiplying 26 hours times \$16 per hour.

Brad Owens testified on behalf of respondent. Mr. Owens indicated that he is self-employed doing business as BCP Contracting. For ten years he performed framing, trim work, tile hardwood floors, vinyl siding, decks and roofing for respondent as well as more than 50 other builders or companies. When he worked for respondent Mr. Owens set his own hours, worked at his own pace and provided his own tools. Respondent provided him no training. He has never been paid hourly wages by respondent. Respondent never withheld taxes, insurance or other employee benefits from Mr. Owens' checks. When Mr. Owens performed work for respondent, all of the materials were provided by respondent.

Mr. Owens indicated it is customary in the home building industry that carpenters are generally independent contractors, although a few builders in the Kansas City use hourly employees. He testified respondent was not one of the builders who hired hourly employees. Mr. Owens testified he verbally or in writing bid on each job and could hire employees to assist him. Mr. Owens conceded that he worked on six new houses for respondent and various remodeling jobs, and all of his bids were verbal. He bids on a framing job by the square foot.

At the end of each year, Mr. Owens testified that he receives a Form 1099 from respondent and the other companies for whom he works. In 2010, respondent paid Mr. Owens \$6,700. Mr. Owens thought the amount of money he would be paid by respondent in 2011 would be at least five times higher than the amount he received in 2010.

Respondent testified in this claim on two occasions. At his deposition on November 8, 2011, respondent indicated he is a general contractor and builds homes. Mr. Owens has worked for respondent for six years as an independent framing contractor. Mr. Owens would verbally bid on the jobs and the bid would be made on a per square foot basis. Respondent normally paid Mr. Owens between \$3 and \$6 a square foot for the work he completed. In 2011, respondent also paid two other individuals to frame. Respondent purchases all building materials and provides the blueprints for the houses. Respondent testified that Mr. Owens and the other framers set their own hours.

³ *Id.* at 56.

Respondent indicated at his November 8, 2011, deposition that he uses independent contractors for nearly all the work on the houses he builds. Respondent hires an excavator who is paid hourly and supplies the equipment and manpower necessary for excavation. The plumbing company utilized by respondent makes a bid, and if the bid is accepted, provides the plumbing materials and his own equipment. Conversely, respondent pays an electrician by the hour. Although the electrician uses his own tools, materials are provided by respondent. Respondent obtains bids for insulation. In 2011, respondent hired two individuals to sheetrock and paid them by the square foot. Respondent provides all the materials, but the sheetrockers provide their own tools. Painters are paid by the square foot and use their own equipment and provide the paint. The individuals who do the concrete work are paid by the foot and supply their own equipment, but respondent purchases the concrete and other materials. Independent contractors are utilized to complete the carpeting, cabinets, foundations, roofs and landscaping.

Respondent testified that he utilizes independent contractors to do the trim carpentry work. First, he has an individual from the lumber yard measure the homes who determined the correct amount of trim materials required to complete the job. He then purchases the trim from the lumbar yard, and the trim carpenter trims the home. Trim carpenters use their own equipment, including their own table saw. In 2011, respondent hired Pat Finn to do most of the trim work. Respondent testified trim carpenters were paid by the foot, and Mr. Finn was paid 70 cents a foot. The jobs would range from 1,500 to 1,700 square feet. It would take Mr. Finn a week to complete a 1,600 square foot job, so his pay would be \$1,120 per week. However, respondent also testified that Mr. Finn would look at the job and give a verbal bid. At the end of a job, Mr. Finn would submit a bill to respondent for payment. Mr. Eldridge indicated that he did not keep a written record of these bids.

Respondent testified he hired claimant through an advertisement placed on Craigslist. Respondent indicated that he took claimant to the job site and showed claimant the work that needed to be done. Claimant verbally bid \$800 to complete the job within a week. Claimant was not paid by the hour and provided all the tools necessary to complete the work.

At his deposition on November 8, 2011, respondent agreed that he does have some employees, his daughter and Jose Martinez. Respondent's 2010 federal income tax return, Schedule C, Line 37, shows labor costs of \$26,714. However, respondent does not know the source of that figure.

Respondent was deposed a second time on November 16, 2011. At this deposition, respondent testified that subcontractors would bid on the jobs and provided their own tools. Respondent paid the subcontractors by the job, withheld no taxes or insurance from their checks, and allowed them to perform the work according to their own methods. At the end of each year, respondent provided each subcontractor with a Form 1099. None of the subcontractors worked exclusively for respondent, and respondent provided them with no training.

At the November 16, 2011, deposition respondent testified that his daughter placed the Craigslist advertisement for a trim carpenter. The advertisement did not indicate that respondent was looking to hire an hourly employee. Respondent denied he offered claimant employment. Claimant was not promised full time work, was not told what hours to work, and was not told how the work was to be completed.

Although respondent testified that he provided a Form 1099 to all subcontractors in 2010, only three Form 1099s, totaling \$19,705.50, were produced at the deposition. He testified that other subcontractors each received more than \$300 in remuneration in 2010. Respondent testified that his only employee in 2010 was Jose Martinez. In 2011 Mr. Martinez and claimant's daughter worked for respondent. Despite being requested by claimant's counsel, respondent's bank records for 2011 were not produced. However, respondent testified that 2011 was respondent's best year in business, as six houses were built.

Two advertisements placed on Craigslist were introduced as evidence at respondent's deposition on November 16, 2011. An advertisement posted July 6, 2011, stated, "Looking for carpenters to work for Eldridge Custom Homes. Doing work in Basehor, Lansing, Leavenworth and Western Wyandotte County. Call 913-226-4987 for details. Pay based on knowledge."⁴ Another advertisement posted on September 7, 2011, contained similar language but specified trim carpenters and required the person answering the advertisement to have his or her own tools and have experience.

Respondent testified that he had no workers compensation insurance on the date claimant was injured and that he could not afford to pay claimant's medical bills.

The ALJ determined that claimant was an employee, not a subcontractor of respondent. The ALJ looked at the relationship between claimant and respondent. The ALJ considered the fact that claimant was paid by the hour and also examined the issue of control. The ALJ stated in her Preliminary Decision:

The court then applied the "right to control" test to determine that respondent did have the right to direct the time and manner in which the work was to be performed by claimant as well as the result to be accomplished. Respondent testified that he was on his way to check claimant's progress when he received the call that claimant had been injured. All materials for the work being performed by claimant were supplied by respondent. Claimant did utilize his own hand tools to complete the work although respondent did testify that tools were available for use by workers whose own tools may have required repair, etc. Finally, the work performed by claimant was an inherent and integral part of respondent's trade or business.

⁴ Eldridge Depo., Resp Ex. D.

These factors all support a finding that claimant was an employee for purposes of the Act.⁵

The ALJ determined there was sufficient evidence to establish that respondent paid more than \$20,000 in wages to non-family employees in 2010 and could reasonably be expected to pay more than \$20,000 in wages to non-family employees in 2011. Therefore the ALJ determined the requirements of K.S.A. 44-505(a)(2) were met, and there was jurisdiction under the Act.

PRINCIPLES OF LAW

The 2011 legislative session resulted in amendments to the workers compensation act. L. 2011, ch. 55, sec. 1, provides in relevant part:

(a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

...

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

L. 2011, ch. 55, sec. 5 provides in relevant part:

(b) "Workman" or "employee" or "worker" means any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer. Such terms shall include but not be limited to: Executive officers of corporations; professional athletes; persons serving on a volunteer basis as duly authorized law enforcement officers, attendants, as defined in subsection (d) of K.S.A. 65-6112, and amendments thereto, drivers of ambulances as defined in subsection (b) of K.S.A. 65-6112, and amendments thereto, firefighters, but only to the extent and during such periods as they are so serving in such capacities; persons employed by educational, religious and charitable organizations, but only to the extent and during the periods that they are paid wages by such organizations; persons in the service of the state, or any department, agency or authority of the state, any city, school district, or other political subdivision or municipality or public corporation and any instrumentality thereof, under any contract of service, express or implied, and every official or officer thereof, whether elected or appointed, while performing official duties; persons in the service of the state as volunteer members of the Kansas department of civil air patrol, but only to the extent and during such periods as they are officially engaged in the performance of functions specified in K.S.A. 48-3302, and

⁵ ALJ Preliminary Decision (Nov. 21, 2011) at 2.

amendments thereto; volunteers in any employment, if the employer has filed an election to extend coverage to such volunteers; minors, whether such minors are legally or illegally employed; and persons performing community service work, but only to the extent and during such periods as they are performing community service work and if an election has been filed an election to extend coverage to such persons. Any reference to an employee who has been injured shall, where the employee is dead, include a reference to the employee's dependents, to the employee's legal representatives, or, if the employee is a minor or an incapacitated person, to the employee's guardian or conservator. Unless there is a valid election in effect which has been filed as provided in K.S.A. 44-542a, and amendments thereto, such terms shall not include individual employers, limited liability company members, partners or self employed persons.

K.S.A. 44-505 provides in relevant parts:

(a) Subject to the provisions of K.S.A. 44-506 and amendments thereto, the workers compensation act shall apply to all employments wherein employers employ employees within this state except that such act shall not apply to:

...
(2) any employment, other than those employments in which the employer is the state, or any department, agency or authority of the state, wherein the employer had a total gross annual payroll for the preceding calendar year of not more than \$20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than \$20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection;

In *Wallis*⁶, the Kansas Supreme Court stated:

The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee, and the right to direct the manner in which the work is to be performed, as well as the result which is to be accomplished. It is not the actual interference or exercise of the control by the employer, but the existence of the right or authority to interfere or control, which renders one a servant rather than an independent contractor. *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a

⁶ *Wallis v. Secretary of Kansas Dept. of Human Resources*, 236 Kan.97, 102-03, 689 P.2d 787 (1984).

⁷ K.S.A. 44-534a.

preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁸

ANALYSIS

The parties give widely divergent versions of the facts concerning the hiring of claimant. Respondent's rendition of events is that claimant answered an advertisement that respondent placed in Craigslist. After visiting the job site with respondent, claimant bid \$800 to complete the necessary work. Claimant was to provide his own tools and could set his own hours and perform the work as he saw fit. Respondent asserts he had little or no control over claimant.

In support of his explanation of what transpired, respondent testified he exclusively uses subcontractors in his business. He generally obtains verbal bids from the subcontractors, provides no training, provides no equipment and has no control over the subcontractors. His only employees are his daughter and Mr. Martinez.

Claimant's recollection of his hiring by respondent divaricates from respondent's version of events. Claimant testified that he requested to be paid \$22 per hour but agreed to accept \$16 per hour from respondent and was eventually paid for 26 hours of work. Claimant testified that he and his wife moved from Lehigh, Kansas, to Eudora, Kansas, so he could work for respondent. Claimant indicated that respondent set his hours and provided materials and most of the equipment for the job. Claimant injured himself using a table saw that he thought belonged to respondent.

There are several facts that are not in dispute: Claimant was provided no training by respondent; respondent provided materials used by claimant; claimant used the tools on his tool belt but used a table saw and other equipment at the job site that did not belong to him; at their initial meeting, respondent and claimant did not discuss benefits such as vacation and sick leave; respondent would check on claimant's progress and review the work at least once a day; and respondent did not set the order and sequence of the work claimant performed.

There were facts the parties did not address when presenting testimony of witnesses and physical evidence. Because of respondent's failure to produce his 2011 year-to-date bank records, it is unknown what respondent paid Mr. Martinez and other individuals and companies for labor. No testimony was elicited from claimant or respondent as to whether respondent had the right to terminate claimant's services at any time.

⁸ K.S.A. 2010 Supp. 44-555c(k).

The services provided by claimant were an integral part of respondent's business. In fact all of the "subcontractors" used by respondent were an integral part of his business. In order to successfully complete a house, respondent needed the services of the plumbers, electricians, roofers, framers, trim carpenters and other independent contractors.

The overwhelming majority of the independent contractors utilized by respondent were individuals, including the framers, sheetrockers, trim carpenters and concrete workers. At his first deposition, respondent testified the excavator, framers, sheetrockers, concrete workers, trim carpenters and electrician were paid by the hour or by the square foot. At his second deposition, which took place a few days later, respondent testified that these same independent contractors bid on each job. Respondent provided the materials for most of the jobs performed by the independent contractors.

Respondent had the right to control claimant's work activities. The following testimony of claimant is significant:

Q. [Mr. Elliott] Now, was it your understanding that you would report to Mr. Eldridge or his general contractor or both?

A. [Claimant] I only talked to him [Mr. Eldridge] about the jobs. And he would be on the job to tell me what he wanted done.⁹

A fact finder must closely examine credibility of the parties. Claimant's testimony was that he was hired at the rate of \$16 per hour. This is corroborated by the fact that he worked 26 hours and was paid \$416. Claimant testified he was required by respondent to work specific hours. The advertisement placed by respondent on Craigslist stated that pay would be "based on knowledge." Claimant and his wife moved 160 miles to a different home to work for respondent. Claimant did not hold himself out as an independent contractor. This Board Member finds the testimony of the claimant that he was hired by respondent as an hourly employee to be credible.

Understandably, respondent wished to reduce his business expenses and tried to do so by labeling nearly everyone who worked for him an independent contractor. The fact that respondent paid many of those who worked for him by the square foot and did not withhold taxes from their checks does not make them independent contractors.

In 2011, the Kansas Legislature made significant and trenchant changes in the Act. However, the provision which indicates "the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act"¹⁰ signifies the Kansas Legislature's intention to bring employees within the provisions

⁹ P.H. Trans. at 45.

¹⁰ L. 2011, ch. 55, sec. 1.

of the Act has not changed. When all relevant facts are considered, this Board Member finds that claimant has met his burden of proof that he was an employee of respondent.

This Board Member also finds that it is more probably true than not that respondent had a total gross payroll exceeding \$20,000 in 2010, excluding non-family employees, and was reasonably expected to exceed the \$20,000 threshold in 2011. Respondent's 2010 tax return showed "cost of labor" as \$26,714. Respondent could not explain where that figure came from. In 2010, respondent paid Jose Martinez \$8,920 in wages. Mr. Martinez continued to work for respondent in 2011. Respondent testified that his business was better in 2011 than in 2010. Considering the wages respondent would pay Mr. Martinez and claimant in 2011, respondent could reasonably be expected to pay more than \$20,000 in wages in 2011. Therefore, this Board Member determines that respondent is subject to the Act.

CONCLUSION

1. Claimant has met his burden of proof that he was an hourly employee of respondent.

2. Pursuant to K.S.A. 44-505, respondent had a sufficient payroll to subject him to the provisions of the Kansas Workers Compensation Act.

WHEREFORE, the undersigned Board Member affirms the November 21, 2011, Preliminary Decision entered by Administrative Law Judge Marcia L. Yates.

IT IS SO ORDERED.

Dated this ____ day of January, 2012.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
Denise E. Tomasic, Attorney for Respondent
Timothy G. Elliott, Attorney for Fund
Marcia L. Yates, Administrative Law Judge